95-20428 (1)

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL ANTHONY VARALLO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State
of Colorado
Case Nos. 94SA145 and 94SA459

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the control of each and every stage of a state's attorney discipline process by one entity, the state Supreme Court, violate federal due process of law?

Does the imposition of an immediate suspension from the practice of law without a meaningful hearing, and the subsequent denial of the mandatory post-deprivation hearing, violate federal due process of law?

Can the lawful discharge of a debt in bankruptcy serve as a partial basis for a state's discipline of an attorney, and can the repayment of such debt be made a requirement of re-admission to the bar?

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The Respondent herein, appearing pro se, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet.App.A) is reported at 913 P.2d 1 (Colo. 1996). The Order of Dismissal in Civil Action No. 94-M-111 in the United States District Court for the District of Colorado (Pet.App.B), and the Order and Judgment (Pet.App.C) of the Tenth Circuit Court of Appeals affirming the dismissal are not published.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257. The opinion of the Colorado Supreme Court was issued on February 12, 1996. A Motion for Enlargement of Time to File Petition for Rehearing/Modification was granted until March 11, 1996 (Pet.App.D and E). The Petition for Rehearing was timely filed, and subsequently denied on March 18, 1996 (Pet.App.F and G).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall ... deprive any person of life, liberty or property without due process of law.

Article I, Section 8, Clause 4 provides that the Congress shall have the power

> To establish ... uniform Laws on the subject of Bankruptcies throughout the United States.

Article VI, Clause 2 provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

The Petitioner was admitted to the bar in Colorado on May 2, 1973. He practiced law in Greeley, Colorado for over twenty years, including six years as a prosecutor in the District Attorney's office. During these twenty years, the Petitioner had developed a sole practice which emphasized litigation, including many reduced

or no fee clients. The Petitioner had no disciplinary actions against him during this twenty year period.

The petitioner was charged with a number of ethical violations, the most serious of which was conversion. He was disbarred for "knowing conversion" in the opinion of the Colorado Supreme Court issued February 12, 1996.

On April 23, 1993, the attorney was immediately suspended from the practice of law without a hearing, effective May 22, 1993 (Pet.App.H). No pre-suspension hearing was held, since the Colorado Rules of Procedure Regarding Lawyer Discipline do not permit a pre-deprivation hearing. Rule 241.8 provides that immediate suspension is determined by a written petition and response (Pet.App. I).

The attorney's suspension was based on a petition filed by an Assistant Disciplinary Counsel for the State of Colorado, and was responded to in writing by the attorney through counsel. The Order of Court imposing the immediate suspension was not signed by a Justice of the Colorado Supreme Court, or even a Clerk. The attorney has repeatedly charged throughout these proceedings that there is no evidence in the record that any member of the Colorado Supreme Court actually read the Petition and Response. The Order contains no findings; noticeably

absent is any determination that immediate suspension was necessary and why the normal course of hearings could not be followed. The investigation had proceeded at a leisurely pace for almost a year, and suddenly it was viewed as an emergency. In essence, the attorney was provided no meaningful pre-deprivation hearing.

The Colorado disciplinary procedure for attorneys is set forth in the Colorado Rules of Civil Procedure. The opinion of the Colorado Supreme Court discusses at length the structure of the attorney grievance process. The petitioner accepts this description except for the unsupported conclusion that for "practical purposes, however, the court entirely controls only the rule-making and appeals function." In reality, the Colorado Supreme Court controls all five components. Colorado is one of eighteen states which have a voluntary bar, completely under the control of the State's Supreme Court[1]. In Colorado, all parts of the system, rule-making, investigation, prosecution, decision-making and appeal are under the control of one entity, the Colorado Supreme Court,

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[1]Based on information contained in a yet unpublished study of the American Bar Association (Pet.App.J).

In re Petition of the Colorado Bar Association, 325 P.2d 932 (Colo. 1958). All agents are either employed or appointed at will by the Colorado Supreme Court. Any defiance of the perceived will of the Colorado Supreme Court by its agents or employees takes an almost superhuman act of courage.

The severity of attorney sanctions has approximately doubled during the last ten years, and the grievance system is rife with cronyism. The Colorado grievance system rules through fear. Striking corroboration that this harsh assessment is prevalent throughout the Colorado bar comes from none other than the current President of the Colorado Bar Association, Phillip S. Figa, Esq. In the August, 1995 edition of The Colorado Lawyer, Mr. Figa authors a feature article on "Why the O.J. Simpson Trial Can't Happen Here." As part of his explanation of why Colorado is different, Mr. Figa states as follows:

> The public may not realize it (and we need to do a better job of informing the public of it), but most Colorado lawyers fear the grievance process and follow the rules not only because it is the right thing to do, but also because of the in terrorem effect of the

Grievance Committee
(p.1750)

This is a very revealing statement. The current President of the Colorado Bar Association brags that the Colorado Supreme Court rules through fear and terror. No mention is made of fairness or justice, and no concern is expressed that the system may be unnecessarily harsh. This statement would not have been made ten years ago; circumstances have changed. Likewise, accountants, doctors, dentists and chiropractors do not seem terrified today of their Colorado regulatory boards. Other professionals' relationship to their boards are mollified by their right to appeal decisions to a neutral judiciary. Lawyers have no such rights.

An article in the September 1995 edition of The Colorado Lawyer provides statistical evidence that this increasing fear of attorneys is justified. During the last ten years, the severity of sanctions for Colorado attorneys has approximately doubled. In his article "Grievances: Recognizing the Realities and Reducing the Risks," Scotty P. Krob, Esq. makes the following analysis:

> "Perhaps of greater concern than the increased likelihood of being grieved is the increased severity of

sanctions being imposed by the Colorado Supreme Court on those attorneys who are unfortunate enough to be grieved and the matter is not resolved through dismissal or a letter of admonition. Such attorneys are then sanctioned by the Supreme Court, and the trends in this arena are disconcerting.

"From 1982 through 1985, 50.125 percent of the attorney discipline cases appearing before the Colorado Supreme Court were resolved through a private censure. In 1994, only 25 percent were resolved in the same manner. During the same time period, the percentage resulting in more severe sanctions has increased. The percentage of cases before the Supreme Court in which the attorney received a public censure increased from 6.25 percent in 1982 through 1985 to 14.75 percent during the 1991 through 1994 period. For suspensions, the change was from 29.25 percent in 1982 through 1985, to

> 38.25 percent in 1991 through 1994. From 1982 through 1985, the Supreme Court imposed its ultimate sanction and disbarred 14.25 percent of the attorneys appearing before it, while 22 percent were disbarred during 1991 through 1994. Overall, it appears that the price of serious misconduct in Colorado has increased substantially over the past decade. (p. 2197, 2198)

It is hard to believe that Colorado attorneys are twice as unethical today compared to ten years ago. The bar has not changed; the Colorado Supreme Court has. Obviously, these statistics show an intentional get tough policy by the Colorado Supreme Court. Employees of the Colorado Supreme Court, such as investigative counsel or disciplinary counsel, impress their boss by being tough. Although this crack-down may be motivated by the best intentions, care must be taken that constitutional requirements are preserved in individual cases.

The attorney requested an "accelerated" hearing which was held in January 1994, over seven months after his immediate suspension. Prior to the hearing, the attorney raised the denial of due process

before the hearing board and in a Complaint filed in the U.S. District Court in Denver, Colorado. Both forums refused to address the federal constitutional issues. The hearing board ruled that it had no jurisdiction to determine constitutional issues. The U.S. District Court dismissed the action without prejudice, and the Order was affirmed as a matter of comity and federalism by the Tenth Circuit Court of Appeals. In addition, the attorney filed a Motion to Recuse directly with the Colorado Supreme Court, which denied the motion without comment. As a practical matter, it was not until February 12, 1996, until a Court considered the constitutional issues, the Colorado Supreme Court, the same entity whose actions and procedures are being criticized.

All issues presented in this Petition for Writ of Certiorari were argued before the Colorado Supreme Court, either in the Motion to Dismiss, which was denied in the opinion, or in briefs. A number of these issues were never addressed by the Court in its opinion. To this date, no neutral court has addressed the merits of the denial of due process, and practically speaking, none will if this Honorable Court denies certiorari. States may not establish procedural rules which operate to defeat federal claims, Howlett v. Rose, 496 US 356, 110 S Ct 2430, 110 L Ed 2d 332 (1990);

Felder v. Casey, 487 US 131, 108 S Ct 2302, 101 L Ed 2d 123 (1988).

At the hearing, the attorney did not know which of three definitions of conversion to defend against since the Colorado Supreme court had never articulated a standard. The two major grievances involved the attorney's spending of advanced fees, which ultimately needed to be refunded. Prior to the hearing, the Colorado Supreme Court had never indicated whether Colorado adopted the majority or minority positions regarding the deposit of advance fee payments in trust accounts. The majority of states treat advanced fees as client money until earned so the attorney must deposit the funds in a trust account and withdraw only as accrued. A sizeable minority of states treat advanced fees as the attorney's money, subject to a potential refund, requiring the depositing of funds into the attorney's business account. After the petitioner's suspension, the Colorado Supreme Court adopted the majority position, People v. Brown, 863 P.2d 288 (Colo. 1993).

In early 1994, the attorney requested a post-deprivation hearing pursuant to Rule 241.8. This hearing may be requested at "any time" and "the hearing shall be held within ten days" (emphasis added). In Colorado the word "shall" makes the hearing mandatory, W. Colorado

Congress v. Dept. of Health, 844 P.2d 1264 (1992). The Colorado Supreme Court denied the attorney's request for a hearing - a hearing that was requested three times.

The petitioner's license to practice law constitutes a property interest which cannot be taken away by governmental action without due process of law, Matthews v. Eldridge, 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976); In re Lamm, 448 S.E.2d 125 (N.C.App. 1994). In an immediate suspension, the post deprivation hearing, including federal constitutional issues, must be heard within a reasonable time, and no court has ever considered a delay over one year as reasonable, Matter of Kenney, 504 N E 2d 652 (Mass. 1987). For example, the California Supreme Court, in Conway v. State Bar of California, 767 P.2d 657, 666 (Calif. 1989), states "we would question a time span of more than one year from inception to the decision of the review department could be countenanced in any circumstances." The petitioner was denied the post-deprivation hearing, and waited almost three years before the initial ruling on his constitutional claims.

The Colorado Supreme Court has structured the grievance system so no state court judge, no hearing officer and not even a federal judge can promptly determine constitutional issues. It takes two

to three years for the Colorado Supreme Court to issue an initial decision, which is subject to appeal. Colorado's grievance system is structurally unconstitutional for failure to provide a meaningful hearing on constitutional issues in a timely manner.

This Honorable Court has made it clear that investigative and adjudicative functions may be combined within an agency without violating notions of due process, Withrow v. Larkin, 421 US 35, 43 L Ed 2d 712, 95 S Ct 1456 (1975). There are two important differences between this case and Withrow. First, unlike Withrow, where only two roles (investigative and decision-making) were blended, this case involves complete command of all five stages by the Colorado Supreme Court. Although the members of the Court must delegate time consuming activities, the Court's agents can be hired and fired at will and must follow the wishes of their principal. It is the ultimate control of all five functions that makes the system lack due process, regardless of the personal integrity of the members of the Colorado Supreme Court. Tweedy v. Oklahoma Bar Ass'n, 624 P.2d (Okla. 1981); Matter of Ross, 656 P.2d 832 (Nev. 1983).

Second, the Colorado Supreme Court's review of its own procedures and rules in imposing the immediate

suspension falls within footnote 25 of Withrow, which states as follows:

> 25. Quite apart from precedents and considerations concerning the constitutionality of a combination of functions in one agency, the District Court rested its decision upon Gagnon v. Scarpelli, 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756 (1973), and Morrissey v. Brewer, 408 US 471, 33 L Ed 484, 92 S Ct 2593 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decision-maker must be other than the one who made the decision under review. Gagnon, supra, at 785-786, 36 L Ed 2d 656, 93 S Ct 1756; Morrissey, supra, at 485-485, 33 L Ed 2d 484, 92 S Ct 2593; see also Goldberg v. Kelly, 397 US 254, 271, 25 L Ed 2d 287, 90 S Ct 1011 (1970). Allowing a decision-maker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point

called upon to review its own prior decisions.

The Petitioner states that a self-review by the Colorado Supreme Court of its own actions in the following instances, is in and of itself unconstitutional:

1. The failure to define the term "conversion" in prior cases or rules. The Colorado Supreme Court admits that the hearing board's "interpretation of conversion is not correct." How can the hearing insure due process when even the board does not know how to define the key charge?

2. The failure of Colorado Rule of Civil Procedure 241.8 to set forth adequate standards for the imposition of an immediate suspension. Compare In re Malvin, 466 A.2d 1220 (D.C.App.1983), for the care given by the District of Columbia Court of Appeals in considering the immediate suspension of a lawyer versus the events in this case. Malvin utilized a four-pronged analysis based on the standards for issuance of a temporary injunction.

3. The failure to have a meaningful hearing before imposing the immediate suspension.

4. The absence of any findings in the Court order imposing the immediate suspension, Matter of Russakoff, 593 N E.2d 1357 (N.Y. 1992).

5. The appearance that the Colorado Supreme Court rubberstamped the actions of its agent in granting the immediate suspension without any evidence in the record of any serious consideration of the issues. D u e process requires not only an actual absence of bias but an avoidance of even the appearance of impropriety in the trying of cases, In re Murchison, 349 US 133, 99 L Ed 942, 75 S Ct 623 (1955), Tumey v. Ohio, 273 US 510, 71 L Ed 749, 47 S Ct 437 (1927); Offutt v. U.S., 348 11, 99 L Ed 11, 75 S Ct 11 (1954).

6. The three-time denial of the mandatory hearing provided in Rule 241.8. Utilizing the language of Withrow, 421 US at 57, this denial of the post-deprivation hearing is the clearest example that the adjudicators are "so psychologically wedded to their complaints that they have, consciously or unconsciously, pre-judged the case so as to avoid the appearance of having erred or changed position."

7. The delay of almost three years before an initial ruling on the merits of the federal constitutional claims, while the attorney remained suspended. This failure to provide a speedy disposition of the case, after immediate suspension, is a denial of due process of law. Gershenfeld v. Justices of the Supreme Court of Pa., 641 F. Supp. 1419 (E.D. Pa. 1986); Fink v. Supreme Court of

Pennsylvania, 651 F. Supp. 1238 (M.D. Pa. 1987)

8. The investigative counsel served a subpoena on years of trust and business bank accounts of the plaintiff without reasonable relevancy and specificity, in violation of constitutional requirements for administrative agencies, People v. Lamb, 732 P.2d 1216 (Colo. 1987); People v. Fleming, 804 P.2d 231 (Colo. 1990); Board of Medical Examiners v. Duhon, 895 P.2d 143 (Colo. 1995). This action is based on a general investigative policy that an NSF check subjects the attorney to a review of three years of bank statements, relevant or not to the original investigation. (Pet.App.K)

9. During the investigation, investigative counsel solicited complaints from clients of the attorney. One client, whose situation allegedly justified the immediate suspension, never filed a grievance, did not want a grievance pursued, and testified at the hearing that she was satisfied with both the professional and financial results in her case.

10. The imposition of the immediate suspension poisoned the entire disciplinary process. Both the Colorado Supreme Court, and its agents, were wedded to a finding of conversion, whether justified or not.

Based on this case and People v. Kardokus, 881 P.2d 1202 (Colo. 1994), the pattern is clear. If you vigorously defend yourself and criticize the system, the Colorado Supreme Court will increase your sanction. In Kardokus, the attorney asserted a vigorous defense, and her discipline was increased in severity from a recommendation of a private censure to thirty days suspension. In the petitioner's case, the recommendation of suspension was increased to disbarment.

During the course of these proceedings, the petitioner was informed of a veiled threat made by investigative counsel to a Colorado attorney, in the presence of the attorney's counsel. The investigative counsel threatened to retaliate against any attorney who provided employment or assistance to this petitioner.

As a result of the immediate suspension, the attorney was forced into bankruptcy. One of the debts discharged in bankruptcy, without objection, was a disputed bill from an investigator, Thomas Pierce, who ultimately filed a grievance. In its opinion, the Colorado Supreme Court uses the discharged debt as a partial basis for the sanction of disbarment but completely ignores the fact that the attorney lawfully discharged the debt in bankruptcy. The Court also ordered that prior to any application for readmission and

as a condition of readmission, the attorney pay the debtor the full amount discharged plus interest at the legal rate from January 12, 1993. This issue was directly presented to the Colorado Supreme Court by the Motion to Dismiss Count III, which the Court denied without comment (Pet.App.L and M).

This action violates Section 525 of Title 11 of the United State Code, Perez v. Campbell, 402 US 637, 29 L Ed 2d 233, 91 S Ct 1704 (1971). The requirement that an attorney pay the discharged debt before readmission to the bar has been recognized by courts of several states as unconstitutional, Matter of Batali, 657 P.2d 775 (Wash. 1989); Matter of Discipline of Schwenke, 849 P.2d 573 (Utah 1993), 39 A L R 4th 586.

REASONS FOR GRANTING THE WRIT

Because of this Court's previous rulings, the attorney discipline process in the States are virtually immune from judicial review. Citing Middlesex County Ethic Comm. v. Garden State Bar Ass'n, 457 US 423, 73 L Ed 2d 116, 102 S Ct 2515 (1982) and Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971), the Tenth Circuit affirmed the federal District Judge's dismissal of the attorney's action against the Colorado Supreme Court on the basis

of comity and federalism. The dismissal was substantially predicated on the fact that the attorney "may seek relief in the United States Supreme Court from a final order of the Supreme Court of Colorado in his case" (Pet.App.B).

In Colorado, an attorney is foreclosed from raising federal constitutional issues in the state court by a decision of the Colorado Supreme Court, Colorado Supreme Court v. District Court, 850 P.2d 150 (1993). He cannot raise federal constitutional issues before the hearing board who assert lack of jurisdiction. Even worse, the United States District Courts defer jurisdiction of federal constitution issues to the State Courts. Thus, without review here, the only hearing is before the very body whose actions and procedures are being criticized.

The structure of the Colorado attorney grievance system is similar to seventeen other states' process. This attorney's situation is far from unique. Additionally, the federal bar is necessarily implicated in this decision. The petitioner has received "simultaneous and identical" sanctions by the Denver Federal District Court. In fact, the Local Rules of Practice of the United States District Court for the District of Colorado provides that an attorney must be licensed to

practice in Colorado before he can practice in the federal bar in Denver. Essentially, the federal judiciary has ceded admission to its bar to the Colorado Supreme Court.

CONCLUSION

This Court should grant a Writ of Certiorari and proceed to determine the issues herein on their merits.

Respectfully submitted,
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APPENDICES

APPENDIX A

SUPREME COURT OF COLORADO
EN BANC

Nos. 94SA145 & 94SA459

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Attorney-Respondent.

FEB. 12, 1996

Rehearing Denied

PER CURIAM

We have consolidated two lawyer discipline proceedings involving the respondent for the purpose of issuing one opinion and order. In No. 94SA145, a hearing panel of the supreme court grievance committee approved the findings and recommendation of a hearing board that the respondent be suspended form the practice of law for three years. The same hearing panel approved the findings and recommendation of a second hearing board in No. 94SA459 that the respondent

pay restitution and be suspended for one year and one day for additional ethics violations. The respondent's misconduct in No. 94SA145 involved the knowing conversion of client funds and, consistent with our previous decisions, disbarment is appropriate.

I

The respondent was admitted to the Colorado bar in 1973. On May 22, 1993, we immediately suspended him from the practice of law based on allegations contained in the present proceedings. See C.R.C.P. 241.8. By way of a motion to dismiss, the respondent asserts that these disciplinary proceedings violate due process and equal protection. We address the constitutional claims first.

The respondent alleges that (1) "[t]he Colorado discipline process is facially in violation of the due process and equal protection clauses of both the Colorado and United States Constitutions"; and (2) "[a]s applied in this case, the actions of the grievance committee, the disciplinary counsel and the Colorado Supreme Court violate the due process and equal protection clauses of both the Colorado and United States Constitutions."

II. Due Process

A lawyer in a disciplinary proceeding is entitled to procedural due process, although there is no requirement that the lawyer be afforded the same constitutional safeguards as in a

criminal trial. People v. Morley, 725 P.2d 510, 514 (Colo. 1986). The respondent asserts that the lawyer disciplinary process in Colorado violates state and federal due process guarantees. it allegedly violates due process, on its face, "since one entity, the Colorado Supreme Court, has complete and total control over each and every stage of the process." As applied, it is also alleged to offend due process because "the Respondent has been denied an independent hearing and appeal since the imposition of the immediate suspension pre-judged his entire case, and has prejudiced his case throughout the system." Finally, the respondent claims that he has been denied due process because the crux of the prohibited conduct in this case, conversion of client funds, has not been defined in a manner readily understandable to a licensed lawyer. See Morley, 725 at 517.

A

"The Colorado Supreme Court, as part of its inherent and plenary powers, has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public." Colorado Supreme Court Grievance Comm. v. District Court, 850 P.2d 150, 152 (Colo. 1993). this power as it is exercised in lawyer discipline proceedings is the basis of the respondent's facial due process challenge. See People v. Susman, 196 Colo. 458, 464, 587 P.2d 782, 786 (1978) (as part of its inherent powers, the supreme court has "the ultimate and

exclusive responsibility for the structure and administration of disciplinary proceedings against lawyers.")

The supreme court promulgated the former Code of Professional Responsibility and the current Rules of Professional Conduct. Further:

> To effectuate these disciplinary rules, the Colorado Supreme Court adopted the Colorado Rules of Procedure Regarding Lawyer Discipline and Disability Proceedings and Mandatory Continuing Legal Education and Judicial Education . . . . See C.R.C.P. 241.1 to 260.7. The Rules of Procedure provide the procedural mechanism for attorney disciplinary proceedings and were established to provide an efficient, orderly, and systematic method to govern attorney discipline.

Colorado Supreme Court Grievance Comm., 850 P.2d at 153.

The supreme Court grievance committee is appointed by the supreme Court. At the time of the proceedings in this case, it was composed of nineteen members, fifteen of whom must be members of the Colorado bar. C.R.C.P. 241.2(a)(1), 7A C.R.S. (1990 & 1995

supp.).[2] The members of the committee "serve at the pleasure of the Colorado Supreme Court." Id. The members of the committee elect a chair, who ten appoints two vice-chairs, one for each grievance committee panel:

> **(c) Panels.** The Chairman shall divide the Committee into two panels of nine members each. Seven members of each panel must be members of the Bar of Colorado. The chairman shall be an ex-officio member of each panel.
>
> Each panel may act as both an inquiry panel and a hearing panel, as described in these Rules. However, no panel shall act as both the inquiry panel and the hearing panel on the same matter. All matters referred for hearing, must be heard by the other panel or a board thereof.

C.R.C.P. 241.2(c). The supreme court also appoints a disciplinary counsel who serves "at the pleasure of the Supreme Court." C.R.C.P. 241.4(a). An investigator (who is either a member of the grievance committee, a lawyer appointed by the committee, the disciplinary counsel, or a member of the disciplinary counsel's staff)

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[2] Effective September 21, 1995, the grievance committee consists of twenty-five members, eighteen of whom shall be members of the Colorado bar. C.R.C.P. 241.2(a)(1).

investigates the alleged misconduct of licensed lawyers. C.R.C.P. 241.10.

At the conclusion of the investigation, the investigator submits a report to one of two grievance committee panels, sitting as an inquiry panel. C.R.C.P. 241.11(a). The inquiry panel may direct further investigation, dismiss the allegations as being without merit or for failure to establish reasonable cause to believe grounds for discipline exist, admonish the lawyer, or authorize the disciplinary counsel to file a formal complaint. Id.

If the investigation results in the filing of a formal complaint, a hearing is conducted before a three-member hearing board designated by the chair or a vice-chair of the committee. C.R.C.P. 241.14. The panel of the grievance committee that was not the inquiry panel in a particular case is the hearing panel for that case. The hearing panel's vice-chair, or the chair of the committee, designates the hearing board as follows:

> **(b) Designation of a Hearing Board.** All hearings on complaints seeking disciplinary action against a respondent shall be conducted by a hearing board designated by the Chairman or a Vice-Chairman. A hearing board shall consist of at least three persons. At least one member of every hearing board shall be a member of the hearing panel or a former member of the Committee,

> and at least two members of every hearing board shall be members of the Bar of Colorado.

C.R.C.P. 241.14(b). At the conclusion of the proceedings before the hearing board, the hearing panel reviews the board's report, and considers any objections filed by the parties to the report. C.R.C.P. 241.15(b). The hearing panel then may dismiss the formal complaint filed against the lawyer, impose an admonition, or refer the matter to the supreme court with a recommendation for discipline. Id.

This court is not bound by the recommendation, however, and ultimately decides what discipline, if any, is appropriate. Colorado Supreme Court Grievance Comm., 850 P.2d at 153. The parties may file exceptions in the supreme court to the findings below and the hearing panel's recommendation of discipline. C.R.C.P. 241.20(b).

The gist of the respondent's argument is that this court wields complete control over five components of the discipline process: rule-making, investigation, prosecution, decision-making, and appeal. For practical purposes, however, the court entirely controls only the rule-making and appeal functions. The investigative, prosecutorial, and decision-making functions are delegated to the disciplinary counsel and to the grievance committee.

Moreover, the investigative and

prosecutorial functions are exercised by the Office of Disciplinary Counsel and the inquiry panel, and are functionally separate from the decision-making function of the hearing board and hearing panel. No member of the hearing board or hearing panel can exercise investigative or prosecutorial functions because of the separation between the inquiry panel and hearing panel, C.R.C.P. 241.2(c), and between the Office of Disciplinary Counsel and hearing panel. The fact that the members of the grievance committee and the disciplinary counsel are appointed by the supreme court is not enough by itself to establish a per se violation of due process.

this case presents even less probability of a biased decisionmaker than Withrow v. Larkin, 421 U.S. 35 (1975). In Withrow, a three-judge federal district court had held that insofar as state statutes authorized suspension or revocation of a physician's license by the Wisconsin Medical Examining Board without the intervention of a neutral detached decisionmaker, they were unconstitutional. The Supreme Court disagreed, and reversed:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in

> those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow, 421 U.S. at 47. Nothing in the structure of the disciplinary rules, the grievance committee, or the Office of Disciplinary Counsel overcomes this "presumption of honesty and integrity in those serving as adjudicators . . . ." Id. Furthermore, the adjudicators do not review their own decisions since the ultimate power of review is held by this court. Cf. id. at 58 n.25 (allowing a decisionmaker to review and evaluate his or her own prior decisions may raise due process problems not present in the Wisconsin administrative scheme).

Our holding is in accord with decisions from other state courts that have considered the due process issue. See In re Crooks, 800 P.2d 898, 904 (Cal. 1990) (combination of investigative and adjudicative functions in one government agency in attorney disciplinary proceeding does not, without more, constitute a due process violation); In re Zoarski, 632 A.2d 1114, 1121 (Comm. 1993) (combination of investigatory and adjudicatory functions in professional disciplinary proceedings does not violate

due process); State v. Turner, 538 P.2d 966, 974-75 (Kansas 1975) (commingling of prosecution and adjudicative functions by the Kansas Board of Law Examiners does not deny due process in disciplinary proceeding); In re Baun, 232 N,.W.2d 621, 623-24 (Mich. 1975) (lawyer disciplinary proceedings in Michigan do not violate due process since the functions of investigation, prosecution, adjudication, and review are functionally separate and exercised by different individuals); In re McCune, 717 P.2d 701, 706 (Utah 1986) (it is not unconstitutional per se for a single administrative agency to perform both investigative and adjudicative functions; Rules of Discipline of the Utah State Bar adequately divide investigative and adjudicative functions so that the integrity of the process is protected); Mendicino v. Whitchurch, 565 P.2d 460, 467 (Wyo. 1977) (particular combination of investigative, accusatory, and adjudicative functions as set forth in Wyoming lawyer disciplinary rules did not violate due process).

Cases where due process was violated present clearly different facts. See In re Ross, 656 P.2d 832, 840 (Nev.1983) (procedure by which Board of Bar Governors functioned as factfinder in disciplinary proceeding against attorneys, involving costs which were substantial and recoverable by state bar only upon finding of misconduct, violated due process); Tweedy v. Oklahoma Bar Ass'n, 624 P.2d 1049, 1054-55 (Okla. 1981) (supreme court itself could not order reinvestigation of attorney disciplinary grievance, since such was an

executive function which it could not exercise consistently with minimum standards of due process).

The conclusion that the lawyer disciplinary procedures are not per se unconstitutional, however, "does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." Withrow, 421 U.S. at 58.

B.

The respondent contends that as applied in this particular case the disciplinary process violated due process. First, he asserts that because he was immediately suspended from the practice of law under C.R.C.P. 241.8 in May 1993 by this court's order, the merits of his conduct were pre-judged, and the hearing panel and hearing board were effectively foreclosed from making any finding other than that he knowingly converted client funds. C.R.C.P. 241.8 provides in part:

> Immediate suspension is the temporary suspension by the Supreme Court of a lawyer's license to practice law for a definite or indefinite period of time while proceedings conducted pursuant to this Rule and these Rules are pending against him. Although a lawyer's license to practice law shall not ordinarily be suspended during the pendency

> of such proceedings, when there is reasonable cause to believe that a lawyer is causing immediate and substantial public or private harm because he has been convicted of a serious crime as defined by C.R.C. P. 241.16(e), or because he has converted property or funds, or because he has engaged in conduct which poses an immediate threat to the effective administration of justice, the Supreme Court may order the lawyer's license to practice law immediately suspended.

(Emphasis added.) The court considers imposition of an immediate suspension on the petition of the grievance committee or disciplinary counsel, and the petition must be supported by affidavit "setting forth sufficient facts to give rise to reasonable cause that the alleged conduct has in fact occurred." Id.

The petition filed in this case by the assistant disciplinary counsel alleged that the respondent had converted client funds and that there was reasonable cause to believe that he was causing immediate and substantial harm. The respondent through his lawyer filed a response to this court's rule to show cause why he should not be immediately suspended. After considering the response, we entered an order immediately suspending the respondent from the practice of law pending further disciplinary action, effective May 22,

1993. The formal complaint in No. 94SA145 embraced the allegations in the petition for immediate suspension, and a hearing was held before a hearing board on January 12, 1994. Six months following the hearing, the respondent filed the first of a number of petitions for dissolution of the immediate suspension order, pursuant to C.R.C.P. 241.8. Because the respondent had already been afforded a hearing on the charges, and the factual findings of the board supported the allegations of the petition for immediate suspension, we denied the respondent's motions to dissolve the order of immediate suspension.

The fact that the respondent received notice of the petition in this case and appeared by counsel in this court in response to the rule to show cause protected his due process rights. Immediate, temporary, or interim suspensions have the same effect as preliminary injunctions. See In re Malvin, 466 A.2d 1220, 1223 (D.C. App. 1983). The commentary to Rule 20 of the ABA Model Rules for Lawyer Disciplinary Enforcement (1993) likens immediate interim suspension, which may be accomplished ex parte, to a temporary restraining order which does not expire automatically. Since immediate suspension under C.R.C.P. 241.8 contemplates the issuance of notice to and an opportunity for the respondent to be heard, it is closer to a preliminary injunction.

Procedural due process is implicated

any time a lawyer's license to practice is even temporarily suspended, see Conway v. State Bar of California, 767 P.2d 657, 660 (Cal. 1989), but an interim suspension does not require a full evidentiary hearing. In re Cummings, 466 A.2d 1224, 1225 (D.C. App. 1983) (hearing before court of appeals at which attorney's counsel appeared after ample notice and was heard in opposition to petition for temporary suspension was sufficient to protect due process). The procedure followed in temporarily suspending the respondent's license to practice law did not violate die process. Nor does the respondent advance any evidence that this court's actions in ordering the suspension affected the deliberations of the hearing boards and hearing panel in this case. The factual basis of the respondent's misconduct has not been strongly contested, nor does the respondent contest the factual findings (in contrast to the legal ramifications of those findings) in either his motion to dismiss or his exceptions. Both of the hearing boards as well as the hearing panel in these proceedings heard the complainant's objections and recommended that the respondent be suspended rather than disbarred.

Second, the respondent claims that he has been denied due process because certain prohibited conduct in this case, i.e., the conversion of client funds, has not been defined in a manner readily understandable to a licensed lawyer. See Morley, 725 at 517. We reject this contention in part VI of this opinion and address the meaning of conversion or

misappropriation of client funds as developed in lawyer discipline cases.

III. Equal Protection

The respondent asserts that the immediate suspension in this case violated equal protection because it will result in a longer suspension in his case than in other comparable cases involving technical or negligent conversion of client funds, and cases where there was no immediate suspension imposed. In the first place, equal protection does not require that all similar attorney misconduct be sanctioned identically. People v. Senn, 824 P.2d 822, 824 (Colo. 1992); Bourdon's Case, 565 A.2d 1052, 1058 (N.H. 1989).

Second, the lawyer discipline cases involving negligent conversion are discussed below and they do not involve misconduct similar to the respondent's because the lawyer's mental state is an important factor in determining the level of discipline. See ABA Standards for Imposing Lawyer Sanctions (1991 & Supp. 1992) (ABA Standards) 3.0(b). Finally, the respondent's immediate suspension will not in fact result in disparate treatment because we have determined to apply the discipline in this case, disbarment, retroactively to the date of his immediate suspension,. The respondent's equal protection arguments are without merit. The motion to dismiss is therefore denied.

IV.

The hearing board in no. 94SA145 found that following facts were established by clear and convincing evidence.

A.

The respondent represented Heidi Fedderson, the daughter of Jens Junior Fedderson, and an heir to his estate. On or about December 10, 1990, the respondent received a death benefit check in the amount of $1,000 from an insurance company, made payable to "Mike Varallo, attorney at law for the estate of Jens Junior Fedderson." The respondent deposited the check in his trust account about December 12, 1990. When he deposited the check, however, his trust account was overdrawn in the amount of $7.12, resulting in a balance after the deposit of $992.88.

On December 5, 1990, Heidi Fedderson retained another lawyer to represent her, and the new lawyer advised the respondent that she would be substituting as counsel.

Also during December 1990, the respondent wrote a check to himself drawn on the trust account, and in the amount of $900. The withdrawal caused the trust account to drop to $92.88, thereby depleting almost all of the funds that the respondent held in trust for the benefit of the Fedderson estate. After learning from the insurer that the respondent had received the $1,000 check for the Fedderson estate, Heidi Fedderson's new lawyer wrote a letter in

February 1991 to the respondent asking about the insurance funds. The respondent did not reply.

In the meantime, the respondent had discussions with the personal representative of the estate regarding disbursement of the $1,000. The respondent and the personal representative agreed that the respondent would withdraw his fee for representing Heidi Fedderson from the insurance funds.

On April 26, 1991, the respondent sent letters to the personal representative and Heidi Fedderson's new lawyer explaining the circumstances of his receipt of the insurance funds. he further indicated that his legal fee for representing Heidi Fedderson was $250.00. The respondent requested written directions from the personal representative and the new lawyer for disbursement of the funds.

On May 23, 1991, the Public Administrator of Weld County was appointed as the personal representative of the estate. Within a few days of his appointment, the new personal representative asked the respondent to deliver the insurance funds to him, but the respondent did not comply. The respondent was requested in June, July, and September, 1991 to deliver the funds, and the personal representative set a September 18, 1991 deadline. When the respondent did not deliver the funds, he was advised that the personal representative would initiate contempt proceedings against him. The respondent

delivered a check drawn on his trust account in the amount of $762.50 (deducting $237.50 as legal fees). On or about October 4, 1991, however, the respondent's check, drawn on his trust account, was returned due to insufficient funds.

The personal representative told the respondent's secretary that he would request an immediate hearing regarding the funds if they were not delivered to his office. Finally, on October 9, 1991, ten months after receiving the estate's funds and after paying himself $900 of the estate's funds, someone from the respondent's office delivered $762.50 in cash to the personal representative.

The hearing board concluded that the respondent converted funds belonging to the Fedderson estate, and failed to promptly deliver the funds as requested by the personal representative. The foregoing conduct violated DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(6) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law); and DR9-203(B)(4) (a lawyer shall promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive).

B.

In October 1991, a lawyer asked the

respondent to be co-counsel in a medical malpractice case involving that lawyer's ex-spouse, Marjorie Goter. It was agreed that the respondent would receive a percentage of any award. They were unsuccessful at the arbitration hearing, and the respondent's fee was renegotiated so that the respondent was to be paid an hourly fee and would be compensated for any costs he advanced. The respondent's co-counsel later settled the medical malpractice case for $15,000.00, and the fee agreement was again amended to provide that the respondent receive $2,000 in legal fees.

In August 1992, the respondent received a check for $5,000.00, in partial settlement of the malpractice claim. He deposited the check into his trust account on September 3, 1992. At the time of the deposit, however, the trust account was overdrawn in the amount of 991.49. The $5,000 deposit therefore resulted in a trust account balance of $4,008.51.

The respondent's co-counsel and the medical malpractice defendant's lawyer agreed that the settlement funds would not be disbursed until the court signed an order approving the settlement agreement, which did not occur until mid-October 1992. Nevertheless, beginning on September 8, 1992, the respondent used the funds in the trust account, including the funds belonging to Marjorie Goter. By October 7, 1992, there was a negative balance in the trust account of $159.25. Finally, on November 27, 1992, the respondent wrote Marjorie Goter a trust

account check in the amount of $3,000.

At that time, there were sufficient funds in the trust account to cover the check.

The respondent's conduct violated DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and DR 1-102(A)(6) (conduct adversely reflecting on lawyer's fitness to practice). The hearing board specifically found that the respondent did not violate Dr 9-102(B)(4) (failure to pay or deliver client funds as requested), since although he disbursed the funds to himself, they were not available for disbursement to the client until the settlement agreement was approved in mid-October 1992.

C.

The hearing board also found that from September 1991 to November 1992 the respondent commingled the funds belonging to the Fedderson estate and to Marjorie Goter with his business and personal funds in his trust account. This commingling of funds violated DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and DR 9-102(A) (all funds of clients paid to the lawyer shall be deposited in one or more identifiable interest-bearing depository accounts maintained in the state in which the law office is located).

D.

In October 1990, Rene Killough retained the respondent to represent her son, Sean Killough, in a domestic violence case involving Sean Killough's wife, and in a dissolution of marriage action filed by the wife. Rene Killough paid the respondent $2,000 pursuant to an oral fee agreement, and an additional $40.00 for a filing fee in December 1990.

Sean Killough and his wife soon reconciled. The dissolution proceedings were either suspended or dismissed, and the criminal charges were dismissed. Because of the reconciliation, the respondent did not have to file an answer in the dissolution proceeding and thus did not pay the $40.00 filing fee.

Rene Killough wrote to the respondent on March 22, 1991, asking for an accounting of the $2,000 legal fee and a refund of the $40.00 filing fee. The respondent's daughter subsequently advised Rene Killough that the respondent would not respond to Killough's request because she was not his client, and that any such requests would have to come from her son. Nevertheless, when Sean Killough wrote a letter to the respondent on July 26, 1991, asking for a refund of the filing fee, the respondent did not reply. the respondent did not provide a prompt accounting or refund to the Killoughs as requested, although the respondent's daughter told Rene Killough that the respondent had received her son's letter, was acting on it, and might refund more than $40.00 to them.

During the summer of 1991, the

respondent suffered from acute thyroiditis. In December 1991, the respondent told Rene Killough that he would "try" to provide the refund before Christmas. Nevertheless, the respondent did not provide an accounting or a refund until August 7, 1992, over seven months after Christmas. On October 2, 1992, he refunded an amount acceptable to the Killoughs.

The hearing board determined that the respondent's conduct violated Dr 9-102(B)(3) (failure to maintain complete records of client property in the possession of the lawyer and to render appropriate accounts to the client regarding the property), and DR 9-102(B)(4) (a lawyer shall promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive). The board also concluded that it had not been established by clear and convincing evidence that the respondent violated DR 1-102(A)(4).

V.

The respondent defaulted in No. 94SA459, and the factual allegations of the complaint were therefore deemed admitted. People v. Farrant, 883 P.2d 1, 1 (Colo. 1994). Based on the default, and the evidence tendered at the hearing, including the respondent's testimony in mitigation, the board made the following findings by clear and convincing evidence.

A.

Roxann Larsen hired the respondent to represent her in a post-dissolution matter involving child custody issues. She paid him a $1,500 refundable retainer on January 15, 1993. The respondent deposited the entire amount into an account entitled, "Mike Varallo, Attorney at Law," about four days later.

Larsen informed the respondent that she no longer wanted to proceed with the post-dissolution matter, and she terminated the representation on February 23, 1993. She also requested a refund of her retainer as soon as possible.

The respondent had done some work on the Larsen case before his representation was discontinued and, based on his hourly rate and the time expended, his earned fees totalled $675.00 and he therefore owed Larsen a refund of $825.00. Before Larsen even asked for a refund, however, the respondent's account was overdrawn in the amount of $8.21. The respondent had therefore already used the entire amount of Larsen's refundable retainer.

The respondent did not return Larsen's telephone calls on four occasions between February 26 and March 4, 1993. When Larsen went to the respondent's office on March 5, she was given a check for $825.00 and an accounting for the $625.00 in services rendered. However, the respondent's check was returned for insufficient funds.

The respondent told Larsen to redeposit the check on March 19, 1993, and he would transfer funds to cover it, but when she did, the check was again returned for insufficient funds. Larsen then spoke with the respondent on March 24, 1993, and he told her to come to his office the next day and he would pay her in cash. larsen appeared the next day at the respondent's office, but he had no money for her.

On March 31, 1993, larsen filed a complaint with the Weld County district attorney's office, and a request for investigation with the Office of Disciplinary Counsel on May 4, 1993. The respondent provided Larsen with a $900.00 refund on May 25, 1993.

The hearing board found that the foregoing conduct, which occurred following the effective date of the Rules of Professional Conduct (January 1, 1993) violated R.P.C. 1.15(b) (failure to promptly refund unearned client funds); R.P.C. 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and R.P.C. 8.4(h) (engage in conduct that adversely reflect on the lawyer's fitness to practice law). The board specifically concluded that the respondent's appropriation of Larsen's refundable retainer was unauthorized.

B.

From January 1993 through April 1993, the respondent commingled client funds with his business and personal funds, contrary to R.P.C. 1.15(a). The

board found, however, that the admitted fact of commingling did not, by itself, establish a violation of R.P.C. 8.4(c), as charged in the complaint.

C.

The respondent represented Judy Dankenbring in a dissolution of marriage action. As part of the representation, the respondent hired Thomas H. Pierce to investigate and locate assets belonging to Dankenbring's husband. The respondent agreed to pay Pierce $55 per hour if assets were found, but Pierce would be reimbursed for only his costs if no assets were located.

Pierce did find assets of Dankenbring's husband, and he billed the respondent $1,846.30 for services rendered. The respondent made no payments to Pierce until April 8, 1992, when he paid $300.00. Pierce filed an action in small claims court against the respondent, but before the July 6, 1992, hearing, the parties agreed that the respondent would enforce an attorney's lien against his client's property settlement, and that the respondent would pay Pierce off before reducing the outstanding attorney fees balance. The respondent made payments to Pierce through January 12, 1993, totalling $1,050.00.

The respondent's conduct in the Dankenbring matter violated DR 1-102(A)(4) and R.P.C. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); as well as DR 1-

102(A)(5) and R.P.C. 8.4(h) (conduct prejudicial to the administration of justice).

VI.

The hearing board in No. 94SA145 determined that the respondent "intentionally and knowingly used client funds for his personal benefit during the period of time after receipt of the funds and prior to delivery of the funds to the Fedderson estate or to Ms. Goter." The board further concluded, however, that "the complainant failed to provide clear and convincing evidence that respondent intended to permanently deprive the Fedderson estate and Marjorie Goter of the use or benefit of these funds." The board therefore found that a sanction as severe as disbarment was not warranted, based on its interpretation of People v. McGrath, 780 P.2d 492 (Colo. 1989). The board's interpretation is not correct.

> While in many cases the lawyer did intend to permanently deprive the victim of funds, see, e.g., People v. Guyerson, 898 P.2d 1062, 1063 (Colo. 1993) (lawyer disbarred for stealing law firm and client funds), we have not required that the lawyer intend to permanently deprive the client of the funds to knowingly convert clients funds for lawyer disciplinary purposes, see People v. Lefly, 902 P.2d 361 (Colo. 1995) (lawyer's knowing conversion of client

> funds almost always merits disbarment even if the funds are eventually replaced(.

People v. Marsh, No. 95SA144, slip op. at 12 (Colo. Jan. 8, 1996). As the New Jersey Supreme Court held in In re Roth, 658 A.2d 1264, 1272 (N.J. 1995):

> Knowing misappropriation [for which the lawyer is almost invariably disbarred] "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." In re Noonan, 102 N.J. 157, 160, 506 A.2d 722 (1986). Misappropriation includes "not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." In re Wilson, 81 N.J. 451, 455 n.1, 409 A.2d 1153 (1979). The motive of the lawyer is irrelevant in determining the appropriate discipline for knowing misappropriation.

Moreover, "[i]ntent to deprive permanently a client of misappropriated funds, however, is not an element of knowing misappropriation." In re Barlow, 657 A.2d 1197, 1201 (N.J. 1995).

A "technical conversion," usually warranting suspension rather than

disbarment, is a conversion or misappropriation where the complainant either concedes that the misappropriation was negligent, People v. Dickinson, 903 P.2d 1132, 1138 (Colo. 1995), or it cannot be proven by clear and convincing evidence that the respondent knowingly converted the funds, People v. Galindo, 884 P.2d 1109, 1112 (Colo. 1994) (board's conclusion that conversion was negligent rather than knowing was supported by the record and would not be overturned); People v. Wechsler, 854 P.2d 217, 220-21 (Colo. 1993) (supreme court will not overturn hearing board's conclusion that intentional conversion was not established by clear and convincing evidence unless there is no substantial evidence in the record to support conclusion); McGrath, 780 P.2d at 493 ("Indeed, if there were not some lingering doubt about whether the respondent engaged in knowing conversion of his client's funds, we would have no hesitation in entering an order of disbarment.")

For example, depositing client funds into a trust account with a negative balance, if done only negligently, would be a technical rather than knowing conversion of client funds. On the other hand, using client funds for personal use without the client's permission by writing a check on a trust account that the lawyer knows contains only client funds would be a knowing conversion of client funds, whether or not the lawyer intended to eventually replace the funds. The lawyer's mental state is the decisive element:

> Because disbarment is the most severe sanction, however, it must be established by clear and convincing evidence that the misappropriation of client funds was knowing, and not merely negligent. See People v. Galindo, 884 P.2d 1109, 1112 (Colo. 1994) (lawyer suspended rather than disbarred where it was established that respondent's conversion of funds was knowing or intentional); see also In re Barlow, 657 A.2d 1197, 1200 (N.J. 1995) (to disbar lawyer for misappropriation of client funds, supreme court must be able to conclude by clear and convincing evidence that misappropriation was knowing).
>
> In this case, the assistant disciplinary counsel has essentially stipulated that it can not be demonstrated by clear and convincing evidence that the respondent's misuse of client funds was knowing or intentional as opposed to negligent.

Dickinson, 903 P.2d at 1138.

VII.

The hearing panel approved the findings and recommendation of a second hearing board in No. 94SA459 that the respondent pay restitution in the Pierce matter in the amount of $796.30, and be

suspended for one year and one day. While the board agreed that advance fee payments must be deposited in client trust accounts, it declined to find that the respondent's personal use of these unearned funds constituted a knowing conversion deserving disbarment.

Depositing unearned retainers into business operating account, and spending an unearned client retainer, violated DR 9-102(A), which required lawyers to deposit client funds in a separate account. People v. Brown, 863 P.2d 288, 290 (Colo. 1993); see also People v. Shidler, 901 P.2d 477, 478 n.1 (Colo. 1995); Lester Brickman, The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the general Office Account?, 10 Cardozo L.Rev. 647 (1989) (endorsing the majority view that unearned retainers or advance fee payments should be deposited in client trust accounts). The board did not find that the respondent's conduct in spending unearned advance fees constituted knowing conversion warranting disbarment. That precise point need not be decided because of the findings of knowing conversion in No. 94SA145.

VIII.

Since the respondent's misappropriation in No. 94SA145 were knowing conversions, disbarment is the presumed sanction barring significant factors in mitigation. People v. Young, 864 P.2d 563, 564 (Colo. 1993); ABA Standards 4.11. The hearing boards found the following factors in mitigation: the

absence of a prior disciplinary record, ABA Standards 9.32(a); and evidence of the respondent's good character in the local legal community, id. at 9.32(g). the board in No. 94SA145 also determined that Marjorie Goter's and Sean Killough's satisfaction with the respondent's legal representation was an additional mitigating factor. Cf. ABA Standards 9.4(f) (failure of client to complain is neither an aggravating nor mitigating factor).

These factors in mitigation, the most significant being the absence of a prior disciplinary record, are insufficient to call for a sanction less than disbarment. Lefly, 902 P.2d at 364. Because of the delay in these proceedings and the fact that the respondent has been suspended from the practice of law since 1993, we have decided to make the effective date of the respondent's disbarment May 22, 1993, the effective date of his immediate suspension.

IX.

It is hereby ordered that Michael Anthony Varallo be disbarred and that his name be stricken from the list of attorneys authorized to practice before this court, effective May 22, 1993. It is further ordered that Varallo pay the combined costs of these proceedings in the amount of $2,995.46 within 90 days of the date of this opinion to the Supreme Court Grievance Committee, 600 Seventeenth Street, Suite 920-S, Dominion Plaza, Denver, Colorado 80202. it is further ordered that, prior to any

application for readmission and as a condition of readmission, the respondent pay Thomas H. Pierce $796.30, with interest at the legal rate from January 12, 1993.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-M-111

MICHAEL ANTHONY VARALLO
Plaintiff,

v.

THE SUPREME COURT OF COLORADO,
Principal,
THE GRIEVANCE COMMITTEE OF THE SUPREME COURT OF COLORADO,
Agent, and
DISCIPLINARY COUNSEL OF THE SUPREME COURT OF COLORADO,
Agent,
Defendants.
Attorney-Respondent.

ORDER OF DISMISSAL

Pursuant to the amended motion to dismiss, filed March 3, 1994, and the Plaintiff's reply thereto, filed March 21, 1994, the court finds and concludes that this civil action should be dismissed for lack of jurisdiction. The plaintiff is attacking a disciplinary proceeding pending against him in the

Supreme Court of Colorado. He asserts the this court has jurisdiction for a claim of constitutional infringement under 42 U.S.C. § 1983 because the disciplinary rules and the disciplinary procedure of the Colorado Supreme Court violate due process of law in several respects. These disciplinary proceedings are still pending and, contrary to the plaintiff's argument, the Supreme Court of Colorado does have jurisdiction to consider the constitutional challenges which the plaintiff attempts to raise here. Moreover, the plaintiff may seek relief in the United States Supreme Court from a final order of the Supreme Court of colorado in his case. Accordingly, it is

ORDERED that this civil action is dismissed, without prejudice, for the failure to state a claim within the jurisdiction of this court.

Dated: July 11, 1994

BY THE COURT:

Richard P. Matsch, Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 94-1356
(D.C. No. 94-M-111)
(District of Colo.)

MICHAEL ANTHONY VARALLO
Plaintiff-Appellant,

v.

COLORADO SUPREME COURT,
Principal;
GRIEVANCE COMMITTEE OF THE
SUPREME COURT OF COLORADO
Agent;
COLORADO SUPREME COURT DISCIPLINARY
COUNSEL,
Agent,
Defendants-Appellees.

ORDER AND JUDGEMENT*

Before SEYMOUR, Chief Judge, McKAY, and HENRY, Circuit Judges.

After examining the briefs and

appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Varallo, formerly a licensed attorney in Colorado, appeals the dismissal of a § 1983 action challenging the procedural constitutionality of the Colorado system of attorney discipline. Mr. Varallo brings this suit as a collateral attack upon disciplinary proceedings now pending against him in Colorado. Mr. Varallo's license to practice law in Colorado was suspended by the Colorado Supreme Court as of May 22, 1994, and his case is currently upon appeal before that court. The district court dismissed the federal action for lack of jurisdiction.

We AFFIRM: Principles of comity and federalism dictate that federal courts abstain form intervention in pending state judicial proceedings that implicate important state interests.

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* This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470

See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-32 (1982); Younger v. Harris, 401 U.S. 37 (1971).

In Middlesex County, the Supreme Court held that federal courts should not interfere with pending attorney disciplinary actions if state procedures allow an attorney the opportunity to raise constitutional challenges to the proceedings. 457 U.S. at 432-37. The disciplinary process followed in Colorado does not differ in any material way from that addressed by the Supreme Court in Middlesex County, and the disciplinary procedures promulgated by the Colorado Supreme Court permit constitutional challenges to be raised before that court. See Colorado Supreme Ct. Grievance Comm. v. District Ct., 850 P.2d 150, 153-54 (Colo. 1993). Mr. Varallo does not dispute that his case is still pending before the Colorado Supreme Court. Younger abstention is therefore appropriate, and the case was properly dismissed.

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

/s/ Monroe G. McKay
Circuit Judge

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA145 & 94SA459
ORIGINAL PROCEEDING IN DISCIPLINE

MOTION FOR ENLARGEMENT OF TIME
TO FILE PETITION FOR REHEARING/
MODIFICATION

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Respondent.

COMES NOW the Respondent herein, and moves this Honorable Court to grant a fourteen day enlargement of time to file his Petition for Rehearing\Modification in the above-captioned consolidated actions. As grounds therefore, the Respondent states as follows:

1. The opinion disbarring the Respondent was issued on February 12, 1996. Due to normal delay in mailing, the Respondent did not receive a copy of the Opinion until February 14, 1996. There has also been an intervening Court holiday, President's Day, since the issuance of the Opinion.

sanction imposed, as well as the complexity of the Opinion, the Respondent needs fourteen additional days, until March 11, 1996, to research and prepare his Petition for Rehearing\Modification.

3. It is in the interest of justice and judicial economy to grant additional time to the Respondent so that he may properly research and succinctly draft his Motion for Rehearing\Modification.

4. Pursuant to C.A.R. 40(a), this Honorable Court may enlarge the time for filing for Petition.

WHEREFORE, the Respondent moves this court to grant until March 11, 1996, to file his Petition for Rehearing\Modification.

Dated this 26th day of February, 1996.

Respectfully submitted:

/s/ Michael A. Varallo
pro se
/s/ Daniel J. Post
Attorney at Law

APPENDIX E

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA145 & 94SA459
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Respondent.

Upon consideration of the Motion for Enlargement of Time to File Petition for Rehearing/Modification filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion for Enlargement of Time to File Petition for Rehearing/Modification shall be, and the same hereby is, GRANTED TO AND INCLUDING MARCH 11, 1996.

BY THE COURT, FEBRUARY 28, 1996.

APPENDIX F

SUPREME COURT, STATE OF COLORADO
CASE NOS. 94SA145 & 94SA459

PETITION FOR REHEARING

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Attorney-Respondent.

Original Proceedings in Discipline

EN BANC ATTORNEY DISBARRED

The attorney-respondent, Michael A. Varallo, through counsel, petitions this Court under C.A.R. 40 to rehear its decision in People v. Varallo, 94SA145 & 94SA459 (Colo. 1996). **THE CONDUCT OF THE ATTORNEY-RESPONDENT DOES NOT WARRANT DISBARMENT.**

This Court disbarred Varallo because his trust account in 1991 and 1992 did not contain sufficient funds to cover his trust obligations to two clients. Slip op. at 15, 17, 23-25. In fact, only one check -- in the amount of $762.50 -- drawn on his trust account (the check written to the Fedderson estate on October 4, 1991) was returned for

insufficient funds. Slip op. at 15, 23, 25. Varallo paid the Fedderson estate $762.50 five days after the check was returned for insufficient funds.

The Court based Varallo's disbarment on a finding of the hearing board that Varallo "intentionally and knowingly used client funds for his personal benefit."[1] Slip. op. at 23. Although the hearing board determined that the complainant failed to provide clear and convincing evidence that Varallo intended to permanently deprive the two clients of the use of the funds, this Court held that whether he intended to replace the funds was irrelevant. Slip op. at 24. The Court ruled, as a matter of law, that a lawyer is subject to disbarment any time that the lawyer's trust account contains insufficient funds to cover client obligations, regardless of whether a client is harmed. Slip op. at 23-25.

According to the Court, "Since the respondent's misappropriations in No. 94SA145 were knowing conversions, disbarment is the presumed sanction barring significant factors in mitigation. People v. Young, 864 P.2d 563, 564 (Colo. 1993); ABA Standards 4.11." Slip op. at 26. Young, however, quoted ABA Standard 4.11 as follows: "[I]n the absence of mitigating

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[1]Varallo's disbarment is based on the finding of "knowing conversion" in No. 94SA145. Slip op. at 26. None of the other fact patterns detailed in the opinion involved alleged conversion.

circumstances, '[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." 864 P.2d at 564 (emphasis added). Varallo's clients were not harmed when his trust account contained insufficient funds. Each of the instances described in the Court's opinion involved a refund of client funds remaining after deduction of Varallo's fee.[2] In each instance, Varallo reduced his fee. As the hearing board found, two of Varallo's clients described in the Court's opinion -- Marjorie Goter and Sean Killough -- testified that they were satisfied with Varallo's legal representation of them. Slip op. at 26-27.

Disbarment is not required if there are significant factors in mitigation. People v. Marsh, 20 B.T.R. 2, 3 (January 8, 1996). Mitigating factors include (1) absence of prior disciplinary record, (2) absence of a dishonest or selfish motive, (3) personal or emotional problems, (4) timely good faith effort to make restitution or to rectify consequences of misconduct, (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, (6) inexperience in the practice of law, (7) character or reputation, (8) physical or mental disability or impairment, (9)

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[2]The exception is the portion of the investigator's fee that was discharged in bankruptcy. Varallo paid, before the order of immediate suspension, $1,050 of the $1,846 due to the investigator.

delay in disciplinary proceedings, (10) interim rehabilitation, (11) imposition of other penalties or sanctions, (12) remorse, and (13) remoteness of prior offenses. ABA Standard for Imposing Lawyer Sanctions § 9.32 (1991).

The mitigating factors that the Court noted were the absence of a prior disciplinary record and the evidence of Varallo's good character in the legal community. Slip op. at 26 In twenty years of practice, Varallo had not had a grievance filed against him until the attorney acting as public administrator for the Fedderson estate filed a grievance long after Varallo had paid the $762.50. The only other grievance filed against him in the consolidated cases was the one filed by Roxann larsen after Varallo had been suspended under C.R.C.P. 241.8 on the basis of the Fedderson complaint.[3]

The remaining instances detailed in the Court's opinion were the result of the disciplinary prosecutor requesting monthly bank statements from Varallo's bank and then calling his clients to inquire if they were satisfied with his representation. None of the clients called had any complaints about the legal work that Varallo did for them. A number of attorneys in Greeley attested to

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[3]Larsen complained that Varallo's check refunding $825 was returned for insufficient funds. Varallo refunded Larsen $900 twenty days after she filed her complaint.

Varallo's professionalism and good reputation in the legal community.

These factors in mitigation, however, were insufficient -- in the Court's opinion[4] -- "to call for a sanction less than disbarment." Slip op. at 27. Varallo petitions this Court to also consider in mitigation the effect of immediate suspension on his ability to respond effectively to the grievance process.

Varallo was a sole practitioner in Greeley. The reason that he had financial difficulty stemmed from a 1991 bout with acute thyroiditis, a condition that lasted three months and decreased his energy. Varallo did not have disability insurance and despite the lack of income during the summer and fall of 1991, he remained responsible for office overhead.

When the Fedderson complaint was filed, Varallo expressed remorse, suggested that the disciplinary prosecutor monitor his accounts, see People v. Shidler, 901 P.2d 477, 480 (Colo. 1995), and offered to accept any appropriate conditions on his practice. The prosecutor refused, and at the prosecutor's request, this Court issued an order of immediate suspension that was effective May 22, 1993. As a result of that order, Varallo lost his ability to

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[4]The hearing board and panel took the mitigation factors into account and recommended a three-year suspension.

earn income as a lawyer: he filed a Chapter 7 bankruptcy,[5] his home was subject to foreclosure, and he suffered depression.

Varallo had no money to pay counsel to represent him in the grievance proceeding. He had no money to pay for a transcript of the hearing in No. 94SA145 to contest the hearing board finding that he knowingly converted client funds, the finding that resulted in his disbarment. Because of depression that caused Varallo to procrastinate, he defaulted in No. 94SA459; his requests were denied. Varallo consistently expressed remorse, and with the exception of the default, cooperated in the grievance process.

The Court's determination to disbar Varallo because his trust account at times did not contain sufficient funds to pay future client obligations should be reconsidered.[6] Varallo requests this Court to consider the fact that none of his clients were harmed and to take into account the effect of his immediate suspension on his ability to respond to the grievance process.

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[5]This Court ordered Varallo to pay restitution to an investigator in the amount of $796 plus interest. Slip op. at 27. The debt to the investigator was discharged in bankruptcy.

[6]Compare Varallo's disbarment with the suspensions in People v. Dickinson, 903 P.2d 1132 (Colo. 1995), and in People v. McGrath, 780 P.2d 492 (Colo. 1989).

CONCLUSION

Varallo requests the Court to accept the recommendation of the hearing board and the panel: that he be suspended for three years. He also requests that the three-year suspension commence on the date of his immediate suspension, May 22, 1993.

Dated this 11th day of March, 1996.

Respectfully submitted,

/s/ Jean E. Dubofsky
Attorney for
Attorney-Respondent

APPENDIX G

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA145 & 94SA459
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Respondent.

Upon consideration of the Petition for Rehearing filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 18, 1996.

APPENDIX H

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SA69
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO
Petitioner,

v.

MICHAEL ANTHONY VARALLO,
Respondent.

Upon consideration of the Petition for Immediate Suspension, the Respondent's Brief in Opposition to Petition for Immediate Suspension, the Request for Greater Particularity and Response to Rule to Show Cause, and the Petitioner's Reply to Request for Greater Particularity and Response to Rule to Show Cause filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Respondent is suspended from the practice of law in the State of Colorado pursuant to C.R.C.P. 241.8, said suspension to be effective thirty days from this date and to remain in effect pending further order of this court.

BY THE COURT, EN BANC, APRIL 22, 1993.

APPENDIX I

RULE 241.8 IMMEDIATE SUSPENSION

Immediate suspension is the temporary suspension by the Supreme court of a lawyer's license to practice law for a definite or indefinite period of time while proceedings conducted pursuant to this Rule and these Rules are pending against him. Although a lawyer's license to practice law shall not ordinarily be suspended during the pendency of such proceedings, when there is reasonable cause to believe that a lawyer is causing immediate and substantial public or private harm because he has been convicted of a serious crime as defined by C.R.C.P. 241.16(e), or because he has converted property or funds, or because he has engaged in conduct which poses an immediate threat to the effective administration of justice, the Supreme Court may order the lawyer's license to practice law immediately suspended. The Supreme Court may consider the immediate suspension of a lawyer's license to practice law on the petition of the Committee, Committee Counsel, or Disciplinary Counsel. The petition shall be supported by affidavit setting for the sufficient facts to give rise to reasonable cause that the alleged conduct has in fact occurred. A copy of the petition shall be served on the lawyer pursuant to these Rules. The Supreme Court, or any justice thereof, may order the issuance of a rule to show cause directing the lawyer to show cause why the lawyer should not be immediately suspended, which rule shall be returnable

within ten (10) days. After the issuance of a rule to show cause, and the period for response has passed without a response having been filed, or after consideration of any response and reply, the Supreme Court may enter an order immediately suspending the lawyer from the practice of law pending further definitive action under this Rule and these Rules. When the Supreme Court enters an order immediately suspending the lawyer, the Disciplinary Counsel shall prepare and file a complaint against the lawyer as provided in C.R.C.P. 241.12, notwithstanding the provisions of C.R.C.P. 241.10 and C.R.C.P. 241.11. Thereafter the matter shall proceed as provided by these Rules.

The lawyer may at any time petition the Supreme Court for dissolution or amendment of an order of immediate suspension. A copy of the petition shall be served upon the Disciplinary Counsel. A hearing on the petition shall be held within ten (10) days before a member of the Committee designated by the Chairman. The designated member shall hear the petition and submit a transcript of the hearing and a recommendation to the Supreme Court within five (5) days after the conclusion of the hearing. Upon the receipt of the recommendation and the record relating thereto, the Supreme Court shall affirm, dissolve or modify its order, if appropriate.

A lawyer who has been immediately suspended pursuant to this Rule shall have the right to request and accelerated disposition of the allegations which form

the bases for the immediate suspension by filing a notice with the Committee Counsel and with the Disciplinary Counsel requesting accelerated disposition. After the notice has been filed, the Disciplinary Counsel shall promptly file a complaint pursuant to these Rules and the matter shall be assigned to a hearing board for accelerated disposition. Thereafter the matter shall proceed and be concluded by the hearing board, the hearing panel and the Supreme Court without appreciable delay.

APPENDIX J

INVOLVEMENT IN DISCIPLINE

Integrated/Unified Bar

Bar Association (20)

Alabama
Alaska
Arizona
California
Florida
Georgia
Hawaii
Idaho
Kentucky
Mississippi
Nevada
North Carolina
Oklahoma
Oregon
South Dakota
Texas
Utah
Virginia
Washington
West Virginia
Wyoming

Supreme Court (12)

District of Columbia
Louisiana
Michigan
Missouri
Montana
Nebraska
New Hampshire
New Mexico

North Dakota
Rhode Island
South Carolina
Wisconsin

Voluntary Bar

Bar Association (0)

Supreme Court (18)

Arkansas
Colorado
Connecticut
Delaware
Illinois
Indiana
Iowa
Kansas
Maine
Maryland
Massachusetts
Minnesota
New Jersey
New York
Ohio
Pennsylvania
Tennessee
Vermont

APPENDIX K

5. BAD-CHECK CASES, (July 12, 1989)

On July 5, 1989, at our joint meeting, we agreed upon the following guidelines for processing bad-check cases:

a. We will not process an isolated instance of writing an NSF check on a personal account that does not designate the account holder as an attorney and that does not involve a law-related expense.

b. We will process even one instance of an NSF check on a personal account that is for a law-related expense and/or that designates the account holder as an attorney.

c. When an NSF check is written on an attorney operating/business account, it will be processed whether it is for a personal or law-related expense. We will ask for the month's bank statement in which the NSF check was written. If other NSF checks appear on that statement, the investigator in his/her discretion will expand the investigation for further bank statement on the operating account. Depending on the number and size of NSF checks on the operating account, the investigator may also decide to request monthly bank statements on the attorney's trust account.

d. When an NSF check is written on an attorney trust account, and there is

no indication that it was due to bank error, we will request monthly bank statements on the trust account up to a period not to exceed three years in most cases.

e. When an attorney voluntarily submits bank statements in support of a contention of inability to pay an expert or court reporter, and the statement reveals an NSF check, the procedures outlined above should be followed depending in which category it falls. The inability-to-pay defense would normally require a showing that the attorney did not have sufficient funds in both his personal and operating accounts.

f. When an attorney indicates that NSF checks have been made good, the investigator in most cases should give the attorney a maximum of 60 days to provide documentary proof such as letters form the creditors, etc. In appropriate cases, the investigator may also subpoena bank records or take the respondent's deposition if either procedure will provide the necessary proof of payment.

APPENDIX L

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA459
ORIGINAL PROCEEDING IN DISCIPLINE

MOTION TO DISMISS COUNT III

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Respondent.

COMES NOW the Respondent, pro se, and hereby moves this Honorable Court to dismiss any and all actions arising from Count III of the Complaint. This Count is based on the discharge in bankruptcy of a disputed debt to Thomas Pierce in the amount of $796.30. As grounds therefor, the Respondent states as follows: 1. Count III of the Findings of Fact and Recommendation of the Hearing Board states as follows:

COUNT III

13. The respondent represented Dankenbring in a dissolution of marriage action. As part of that representation, the respondent hired Thomas H.

Pierce to investigate and locate assets belonging to Ms. Dankenbring's husband.

14. The respondent and Mr. Pierce entered into an agreement whereby the respondent would pay Mr. pierce $55.00 per hour if assets were found but, if no assets were located, Mr. Pierce was to be reimbursed for costs only. The respondent then gave Ms. Dankenbring's telephone number and address to mr. Pierce and asked that Mr. Pierce begin his investigation by meeting Ms. Dankenbring.

15. Mr. Pierce successfully located assets of Ms. Dankenbring's husband, and Mr. Pierce billed the respondent $1,846.30 for services rendered. However, the respondent made no payments to mr. Pierce until April 8, 1992, when the respondent made a $300.00 payment.

16. On May 6, 1992, Mr. Pierce sued the respondent in small claims court; the matter was set for hearing on July 6, 1992. On July 6, 1992, Mr. Pierce and the respondent agreed to a disposition whereby the

respondent would enforce his attorney's lien against his client's property settlement (in which she was paid monthly sums through the court registry); and the respondent would pay off Mr. Pierce prior to reducing his attorney fee balance.

17. The respondent made an additional payment of $750.00 on January 12, 1993, and then made no further payments. The payments made to Mr. Pierce totalled $1,050.

Footnote: According to paragraph 31 of the Complaint, the respondent's payments to Mr. Pierce totalled $750.00. However, the report of investigation, Exhibit 3, indicated that the respondent paid $300.00 on April 8, 1992, and $750.00 on January 12, 1993.

2. In the conclusions, the Hearing Board states as follows:

COUNT III

22. The respondent's refusal and failure to honor his contract and subsequent settlement agreement with Thomas H. Pierce which was prepared in 1992, prior to adoption of Rules of Professional Conduct,

> constitutes a violation of DR1-102(A)(1), DR1-102(A)(4), and DR1-102(A)(5), and constitutes grounds for discipline pursuant to Rule 241.6 of the Rules of Procedure Regarding Lawyer Discipline. To the extent that the respondent's failure to honor his agreements continued into 1993, his actions also constitutes violations of Rule 8.4(c), 8.4(h), and 8.4(a) of the Rules of Professional Conduct which became effective January 1, 1993.

3. The Hearing Board recommends that the respondent be suspended from the practice of law for one year and one day and, "as a condition of reinstatement, that he be required to make restitution in the Pierce matter, in the amount of $796.30." The recommendations do not specify how much of the recommended suspension is based on Count III in relationship to the other counts.

4. Count III arose from a disputed debt which was listed in the Petition for Bankruptcy filed by the respondent in January 1994. This debt was disputed because the respondent never accepted personal responsibility for the debt. Mr. Pierce directly contracted with the client, and not the attorney. Since the case always had a high risk of collection (in fact, the client discharged her debts

to both Mr. Pierce and the respondent in bankruptcy, Exhibit A), Mr. Pierce accepted the risk of non-payment in his direct contract with the client. In exchange, he charged her a higher than normal hourly fee of $55.00. The respondent did not accept responsibility for this higher investigator's fee, and, if fact, lost much more money than Mr. Pierce did when his attorney's fees was discharged in bankruptcy by the client.

5. This debt was discharged in bankruptcy, without objection from the creditor, in October 1994. A copy of the respondent's discharge is attached as Exhibit B. Mr. Pierce threatened the respondent with this grievance, before filing, in order to gain an illegal preference over other creditors. Apparently, he has succeeded, since restitution in the amount of $796.30 is sought.

6. The sole cause of filing the bankruptcy petition was the devastating impact on the respondent's personal finances caused by the immediate suspension imposed in 93SA69. The respondent continues to assert that this immediate suspension was unfair, illegal and unconstitutional.

7. It is painfully ironic to the respondent that he was forced into bankruptcy by the immediate suspension, and now the legal discharge of a debt in bankruptcy is being used to justify further suspension. it is not wrong to exercise a right.

8. Continuing these proceedings based on a debt discharged in bankruptcy is a direct violation of Section 525 of Title 11 of the United States Code which reads as follows:

> §525. Protection against discriminatory treatment (a) Except as provided in the perishable Agricultural Commodities Act, 1930 [7 USCS §§ 499a et seq.], Packers and Stockyards Act, 1921 [7 USCS §§ 181 et seq.], and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 [7 USCS § 204] a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title [11 USCS §§ 101 et seq.] or a bankrupt or a debtor under the Bankruptcy Act or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title [11 USCS §§

> 101 et seq.] or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title [11 USCS §§ 101 et seq.], or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title [11 USCS §§ 101 et seq.] or that was discharged under the Bankruptcy Act. (emphasis added.

9. Clearly, the only basis for justifying a suspension under Count III is "respondent's failure to honor his agreements." In other words, not pay the debt. This state action is a clear violation of the Supremacy Clause contained in Article VI, Clause 2 of the United States Constitution and 11 U.S.C. §525, Perez v. Campbell, 402 U.S. 637, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971); In Re Briner, 10 B.R. 850 (Bkrtcy. Co., 1981); In Re Island Club Marina, Ltd., 38 B.R. 847 (Bkrtcy. Ill. 1984); In Re Fasse, 40 B.R. 198 (Bkrtcy. Co., 1984).

10. In addition, this Honorable court cannot order that restitution be paid in this matter. This debt involves no fraud or crime, but is only a civil liability between two private persons. None of the exceptions in 11 U.S.C. 523 apply and this debt was properly discharged, without objection, in bankruptcy. Merely terming the debt to be "restitution" has no legal effect, and this change of terminology cannot disguise the fact that

the order mandates compensation for an actual pecuniary loss that was lawfully discharged in bankruptcy. The respondent does not dispute that costs are payable, but a debt to a private party previously discharged in bankruptcy is different, and cannot be ordered to be paid without violating federal law, In Re Lewis, 151 B.R. 200 (Bkrtcy. Ill. 1992); In Re Haberman, 137 B.R. 292 (Bkrtcy. Wis. 1992) and In Re Betts, 149 B.R. 891 (Bkrtcy. Ill. 1993).

WHEREFORE, the Respondent requests that the allegations contained in Count III be dismissed and no further action taken therein.

Respectfully submitted this 2nd day of June, 1995.

/s/ Michael A. Varallo

EXHIBIT A

UNITED STATES BANKRUPTCY COURT

167 U.S. Courthouse
401 N. Market Street
Wichita, KS 67202

District of Kansas

Case Number 93-12161

Mike Varallo
Greeley Bldg., Ste. 110
710 11th Avenue
Greeley, CO 80631

IN RE(NAME OF DEBTOR)
Judy Carol Dankenbring, 522-72-9385, aka Judy Carol, aka Judy Rasmussen, aka Judy Crites

DISCHARGE OF DEBTOR AND FINAL DECREE

It appearing that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on 08/23/93, and that an order for relief was entered under Chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained];

IT IS ORDERED that

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of personal liability of the debtor with respect to any of the following:

(a). debts dischargeable under 11 U.S.C. Sec 523;

(b). unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. 523(a);

(c) debts determined by this court

to be discharged under 11 U.S.C. Sec. 523.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts are personal liabilities of the above-named debtor.

4. The trustee herein be and hereby is discharged as Trustee; the bond be and it hereby is cancelled; and this case be and it hereby is closed.

Dated: 5/6/94

BY THE COURT

John K. Pearson
United States Bankruptcy Judge

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO

U.S. BANKRUPTCY COURT
721 19th Street
Denver, CO 80202-2508

Case Number 94-10834

Michael Anthony Varallo
20526 WCR 50
LaSalle, CO 80645

IN RE(NAME OF DEBTOR)
Michael Anthony Varallo, 214-48-8803, aka Mike Varallo

DISCHARGE OF DEBTOR

It appearing that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on 01/28/94, and that an order for relief was entered under Chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained];

IT IS ORDERED that

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of personal liability of the debtor with respect to any of the following:

(a). debts dischargeable under 11 U.S.C. Sec 523;

(b). unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. 523(a);

(c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts are personal liabilities of the above-named debtor.

Dated: 10/14/94

BY THE COURT

Donald E. Cordova
United States Bankruptcy Judge

APPENDIX M

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA459
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO
Complainant,

v.

MICHAEL ANTHONY VARALLO,
Respondent.

Upon consideration of the Motion to Dismiss Count III and the Response thereto having been filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion to Dismiss Count III shall be, and the same hereby is, DENIED.

BY THE COURT, JUNE 13, 1995.